

1 COTKIN & COLLINS
 A PROFESSIONAL CORPORATION
 2 Robert G. Wilson SBN 58653
 E-Mail: rgw@cclawfirm.cc
 3 Terry C. Leuin, SBN 105968
 E-Mail: tcl@cclawfirm.cc
 4 300 South Grand Avenue, 24th Floor
 Los Angeles, CA 90071-3134
 5 Telephone: (213) 688-9350
 Facsimile: (213) 688-9351
 6

7 COTKIN & COLLINS
 A PROFESSIONAL CORPORATION
 William D. Naeve, SBN 92270
 8 E-Mail: wdn@cclawfirm.cc
 200 West Santa Ana Blvd., Suite 800
 9 Santa Ana, CA 92701-7536
 Telephone: (714) 835-2330
 10 Facsimile: (714) 835-2209

11 Attorneys for Defendant
 Insurance Corporation of New York
 12

13 UNITED STATES DISTRICT COURT
 14 NORTHERN DISTRICT OF CALIFORNIA
 15

16 FAIRMONT SPECIALTY INSURANCE)	No. C 07-03421 VRW
COMPANY, a Delaware corp-)	
17 oration, and TIG INSURANCE)	
COMPANY, a California)	
18 corporation,)	INSCORP'S MEMORANDUM OF POINTS
)	& AUTHORITIES IN OPPOSITION TO
19 Plaintiffs,)	MOTION FOR REMAND
)	
20 vs.)	
)	
21 INSURANCE CORPORATION OF NEW)	Date: September 6, 2007
YORK, a New York corporation,)	Time: 2:00 p.m.
22 DEPENDABLE SHEET METAL, a)	Place: Courtroom 6
California corporation, and)	
23 DOES 1 through 10,)	
)	
24 Defendants.)	
)	

25
 26 ///
 27 ///
 28 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Table of Contents

	<u>Page</u>
<u>Table of Authorities</u>	ii
<u>Preliminary Statement</u>	2
<u>Argument</u>	3
I. IT IS CLEAR THAT THE COMPLAINT SEEKS NO RELIEF AGAINST DEPENDABLE, AND THAT DEPENDABLE IS A "SHAM" PARTY.....	3
II. DEPENDABLE HAS MADE NO SHOWING WHATSOEVER THAT INSCORP'S CONTENTION REGARDING THE NEED TO REALIGN THE PARTIES IS INCORRECT.....	6
III. IN LIGHT OF DEPENDABLE'S "SHAM" STATUS AND ITS MISALIGNMENT AS A DEFENDANT RATHER THAN A PLAINTIFF, DEPENDABLE'S CITIZENSHIP MUST BE DISREGARDED FOR PURPOSES OF THE "RULE OF UNANIMITY" AND THE "NO LOCAL DEFENDANTS RULE".....	9
IV. DEPENDABLE'S INTENTION TO ASSERT A COUNTERCLAIM THAT INCLUDES NON-DIVERSE COUNTER-DEFENDANTS HAS NO RELEVANCE TO WHETHER DIVERSITY OF CITIZENSHIP EXISTS WITH RESPECT TO THE COMPLAINT, OR WHETHER THAT MATTER SHOULD BE REMANDED.....	11
V. DEPENDABLE HAS ASSERTED UTTERLY NO PROPER BASIS FOR THE APPLICATION OF THE DOCTRINE OF ABSTENTION.....	13
<u>Conclusion</u>	15

Table of Authorities

3	<u>Cases:</u>	<u>Page(s)</u>
4	<i>Angst v. Royal Maccabees Life Ins. Co.,</i>	
5	77 F.3d 701 (3d Cir. 1996).....	7
6	<i>Cobb v. Delta Exports, Inc.,</i>	
7	186 F.3d 675 (5th Cir. 1999).....	11
8	<i>Coughlin v. Nationwide Mutual Insurance Co.,</i>	
9	776 F. Supp. 626 (D. Mass. 1991).....	5
10	<i>Dacosta v. Novartis AG,</i>	
11	180 F. Supp. 2d 1178 (D. Or. 2001).....	4
12	<i>Dolch v. United California Bank,</i>	
13	702 F.2d 178 (9th Cir. 1983).....	7, 9
14	<i>First National Bank of Chicago v. Mottola,</i>	
15	302 F.2d 785 (N.D. Ill. 1969), <i>aff'd sub</i>	
16	<i>nom. First National Bank of Chicago v.</i>	
17	<i>Ettlinger</i> , 465 F.2d 343 (7th Cir. 1972).....	10
18	<i>HB General Corp. v. Manchester Partners, LP,</i>	
19	95 F.3d 1185 (3d Cir. 1996).....	12
20	<i>Indianapolis v. Chase National Bank,</i>	
21	314 U.S. 63 (1941).....	6
22	<i>McCabe v. General Foods Corp.,</i>	
23	811 F.2d 1136 (9th Cir. 1987).....	5
24	<i>Morris v. Princess Cruises, Inc.,</i>	
25	236 F.3d 1061 (9th Cir. 2001).....	11
26	<i>New York State Insurance Fund v. U.S. Liability</i>	
27	<i>Insurance Co., No. 03 Civ. 6652 (LMM),</i>	
28	2004 U.S. Dist. LEXIS 3124 (S.D.N.Y. 2004).....	8, 9, 10
29	<i>Plumtree Software, Inc. v. Datamize, LLC, No.</i>	
30	C 02-5693 VRW, 2003 U.S. Dist. LEXIS	
31	26948 (N.D. Cal. October 6, 2003).....	7
32	<i>Polyplastics, Inc. v. Transconex, Inc.,</i>	
33	713 F.2d 875 (1st Cir. 1983).....	9
34	<i>Prudential Real Estate Affiliates, Inc. v.</i>	
35	<i>PPR Realty, Inc.,</i>	
36	204 F.3d 867 (9th Cir. 2000).....	6
37	<i>Quackenbush v. Allstate Insurance Co.,</i>	
38	517 U.S. 706 (1996).....	13, 14

1	<i>Serstad v. Midland-Ross Corp.</i> ,	
2	471 F. Supp. 298 (E.D. Wis. 1979).....	10
3	<i>State National Insurance Co. v. Yates</i> ,	
4	391 F.3d 577 (5th Cir. 2004).....	12
5	<i>United States Fidelity & Guaranty Co. v.</i>	
6	<i>Thomas Solvent Co.</i> , 955 F.2d 1085	
7	(6th Cir. 1992).....	7
8	<u>Statutes:</u>	
9	28 U.S.C. § 1367(a).....	12
10	28 U.S.C. § 1441.....	4
11	28 U.S.C. § 1441(b).....	10
12	28 U.S.C. § 1447(e).....	11
13	<u>Other Authorities:</u>	
14	14 C. Wright & A. Miller, <i>Federal Practice &</i>	
15	<i>Procedure</i> § 3731, (2d ed. 1984).....	10
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

1 Defendant Insurance Corporation of New York
2 ("INSCORP") respectfully submits this memorandum of points and
3 authorities in opposition to the motion of Dependable Sheet
4 Metal ("Dependable") for an order remanding this action to the
5 Contra Costa County Superior Court.

6
7 Preliminary Statement

8 Dependable's motion is filled with distractions and
9 irrelevancies in an apparent effort to conceal the inescapable
10 fact that the Complaint seeks no relief against Dependable and
11 that Dependable is, therefore, a "sham" party whose citizenship
12 must be disregarded for purposes of assessing the existence of
13 diversity jurisdiction.

14 Even if that were not the case, Dependable does not
15 even dispute that, with regard to the "primary matter in dis-
16 pute" in the Complaint herein, i.e. whether the INSCORP policy
17 provides coverage to Dependable for the underlying construction
18 defect cases, the interests of Dependable and the two plaintiff
19 insurance carriers^{1/} are precisely aligned. Rather, Dependable
20 points out that it is at odds with those Plaintiffs on several
21 other issues. But such other disputes have no bearing on the
22 issue of proper alignment of parties as to the removed action.

23 That being the case, Dependable's invocation of the
24 "rule of unanimity" and the "no local defendants rule" is
25 unavailing, since both of those "rules" would only be applicable

26
27 ^{1/} Plaintiffs Fairmont Specialty Insurance Company and TIG
28 Insurance Company will be referred to herein as "Fairmont" and "TIG,"
respectively, and collectively as "Plaintiffs."

1 Dependable is named as a defendant in the First Cause of Action,
2 the only relief sought is a declaration that INSCORP has a duty
3 to defend and/or indemnify Dependable.

4 In attempting to address this issue, Dependable
5 misstates the contents of the Notice:

6 On page 5 of INSCORP's Notice of Removal,
7 INSCORP claims that the RANGER and TIG
8 complaint fails to include any cause of
9 action against DEPENDABLE, but less than 6
10 lines later they admit that DEPENDABLE is
11 named as a defendant in the Declaratory
12 Relief claim.

13 (Dependable Sheet Metal Notice of Motion/Motion To Remand, dated
14 July 26, 2007 ["Motion"], at 16.)

15 At no point does INSCORP assert that the Complaint
16 "fails to include" a cause of action against Dependable.
17 Rather, the Notice states that "the Complaint does not seek any
18 relief against Dependable" and that it fails "to state a cause
19 of action against Dependable." (Notice of Removal of Action
20 Under 28 U.S.C. § 1441, dated June 29, 2007 ["Notice"], at 5.)
21 Both of these statements are absolutely correct and demonstrate
22 that Dependable is a "sham" defendant. *E.g., Dacosta v.*
23 *Novartis AG*, 180 F. Supp. 2d 1178, 1181 (D. Or. 2001).

24 Dependable faults INSCORP for failing to put forth
25 "summary judgment type evidence" on this issue (Motion at 17),
26 but the fraudulent nature of Dependable's status as a defendant
27 is manifest on the face of Plaintiffs' Complaint and it is
28 unnecessary to "pierce the pleadings." It is well-settled that

1 "[i]f the plaintiff fails to state a cause of action against a
2 resident defendant and the failure is obvious according to the
3 settled rules of the state, the joinder of the resident
4 defendant is fraudulent." *McCabe v. General Foods Corp.*, 811
5 F.2d 1336, 1339 (9th Cir. 1987).

6 Although Dependable is named in the declaratory relief
7 cause of action, the declaration sought is solely against
8 INSCORP. It is difficult to imagine a more obvious failure to
9 state a cause of action than one that seeks no relief against a
10 defendant. *E.g., Coughlin v. Nationwide Mutual Insurance Co.*,
11 776 F. Supp. 626, 629 (D. Mass. 1991) ("The complaint only
12 demands relief from Nationwide. It demands no relief from and
13 states no claim against the Commissioner [of Insurance].
14 Therefore, the plaintiff joined the Commissioner fraudulently
15 and the joinder of the Commissioner did not preclude
16 removal.") (footnote omitted).

17 Dependable's invocation of the "continuing loss
18 doctrine" (Motion at 19) is a distraction that does not aid its
19 position because it does not change the fact that the relief
20 sought by Plaintiffs runs against INSCORP only. Dependable
21 cites no authority for the propositions (1) that the continuing
22 loss doctrine makes Dependable an indispensable party to this
23 action or (2) that Dependable might be subjected to a finding of
24 *res judicata* if it were not a party. Neither is correct, but
25 even if they were, we will now show that Dependable should be
26 aligned as a plaintiff, not a defendant, in any event.

27 ///

1 II. DEPENDABLE HAS MADE NO SHOWING WHATSOEVER
2 THAT INSCORP'S CONTENTION REGARDING THE NEED
3 TO REALIGN THE PARTIES IS INCORRECT.

4 In an effort to establish that Dependable's interests
5 are adverse to those of Fairmont and TIG, Dependable submits a
6 lengthy declaration purporting to identify major issues on which
7 Dependable and Plaintiffs are adverse (Declaration of Jayne
8 Loughry, dated July 25, 2007, ¶¶ 8-19). While perhaps
9 interesting, this recitation is irrelevant to the issue before
10 the Court, which is whether Dependable's interests are adverse
11 to Plaintiffs with respect to the "primary matter in dispute" in
12 the Complaint that was removed from state court.

13 As the Supreme Court has noted, with regard to
14 diversity jurisdiction, "[l]itigation is the pursuit of
15 practical ends, not a game of chess." *Indianapolis v. Chase*
16 *National Bank*, 314 U.S. 63, 70 (1941). Thus, it is the duty of
17 the Court "to 'look beyond the pleadings and arrange the parties
18 according to their sides in the dispute.'" *Id.* (citation
19 omitted). This question "must be ascertained from the
20 'principal purpose of the suit,' . . . and the 'primary and
21 controlling matter in dispute.'" *Id.* (citations omitted).

22 As described in INSCORP's Notice of Removal, in
23 determining issues of diversity, the Ninth Circuit has stated
24 that courts "must align for jurisdictional purposes those
25 parties whose interests coincide respecting the 'primary matter
26 in dispute.'" *Prudential Real Estate Affiliates, Inc. v. PPR*
27 *Realty, Inc.*, 204 F.3d 867, 873 (9th Cir. 2000) (citation
28

omitted).^{2/} Thus, "[i]f the interests of a party named as defendant coincide with those of the plaintiff in relation to the purpose of the lawsuit, the named defendant must be realigned as a plaintiff for jurisdictional purposes." *Dolch v. United California Bank*, 702 F.2d 178, 181 (9th Cir. 1983) (emphasis added) (citation omitted). Moreover, "[r]ealignment may be required even if a diversity of interest exists on other issues." *Id.* *Accord Plumtree Software, Inc. v. Datamize, LLC*, No. C 02-5693 VRW, 2003 U.S. Dist. LEXIS 26948, at *9 (N.D. Cal. October 6, 2003), citing *U.S. Fidelity, supra*, 955 F.2d at 1089.

Despite Dependable's contention, it simply does not matter that it may have multiple disagreements with Fairmont and TIG, even if those disagreements are related to the dispute between Fairmont and TIG, on the one hand, and INSCORP on the other, that forms the basis of Plaintiffs' Complaint. The "primary matter in dispute" in the Complaint is whether the INSCORP policy provides coverage for Dependable for the various construction defect cases in which Dependable has been a defendant. On that issue, even Dependable does not deny that its interests are aligned precisely with those of Fairmont and TIG. All of the other issues with respect to which Dependable

///

^{2/} The Ninth Circuit is not alone in utilizing the "primary purpose" test. *E.g.*, *Angst v. Royal Maccabees Life Ins. Co.*, 77 F.3d 701, 704 (3d Cir. 1996) ("[A] court must first identify the primary issue in controversy and then determine whether there is a real dispute by opposing parties over that issue.") (internal quotes and citation omitted); *United States Fid. & Guar. Co. v. Thomas Solvent Co.*, 955 F.2d 1085, 1089 (6th Cir. 1992) ("[T]he parties [should] be aligned in accordance with the primary dispute in controversy, even where a different, legitimate dispute between the parties supports the original alignment.").

1 claims to be adverse to Fairmont and TIG are issues that are not
2 raised by the Complaint.

3 In a case virtually on all fours with the instant
4 matter, the district court found that the non-diverse
5 citizenship of certain defendants should be disregarded in
6 determining the existence of federal jurisdiction. As in the
7 present matter, in *New York State Insurance Fund v. U.S.*
8 *Liability Insurance Co.*, No. 03 Civ. 6652 (LMM), 2004 U.S. Dist.
9 LEXIS 3124 (S.D.N.Y. March 1, 2004), one insurer sought a
10 declaration that another insurer was obligated to indemnify
11 their mutual insureds. However, the complaint for declaratory
12 relief named as defendants Master Duct and Pal Pal -- the two
13 insureds -- who were non-diverse. In words that should resonate
14 in this case, the district court stated:

15 Here, the complaint seeks, in substance,
16 only a declaration that U.S. Liability is
17 obligated to indemnify Master Duct and Pal
18 Pal. If plaintiff is successful, Master
19 Duct and Pal Pal will surely not be
20 prejudiced. Indeed, Master Duct and Pal Pal
21 are properly aligned, for diversity
22 purposes, as plaintiffs rather as defen-
23 dants: if they have an interest in this
24 case, the "collision of interests" involved
25 . . . is between Master Duct and Pal Pal on
26 the one hand, and U.S. Liability (which
27 denied coverage), on the other, not between
28 Master Duct and Pal Pal, on the one hand,

1 and plaintiff (which seeks coverage for
 2 them), on the other.
 3 2004 U.S. Dist. LEXIS 3124, at *5-*6 (emphasis in original)
 4 (citations and footnotes omitted).

5 That is precisely the situation here. Fairmont and
 6 TIG seek coverage under the INSCORP policy for Dependable.
 7 There is no "collision of interests" between Dependable and the
 8 two Plaintiff carriers on that issue. Rather, there is a
 9 collision of interests as to the only matter in controversy in
 10 the Complaint between Dependable and INSCORP.^{3/} Plainly,
 11 Dependable is properly aligned, not as a defendant, but as a
 12 plaintiff.

13
 14 III. IN LIGHT OF DEPENDABLE'S "SHAM" STATUS AND ITS
 15 MISALIGNMENT AS A DEFENDANT RATHER THAN A
 16 PLAINTIFF, DEPENDABLE'S CITIZENSHIP MUST BE
 17 DISREGARDED FOR PURPOSES OF THE "RULE OF
 18 UNANIMITY" AND THE "NO LOCAL DEFENDANTS RULE."

19 In another distraction, Dependable invokes what is now
 20 commonly known as the "rule of unanimity," which holds that if
 21 there are several defendants in an action, the right to remove
 22 belongs to them jointly, and all must join in the notice of
 23 removal. Dependable fails to note that this rule has several
 24 exceptions, one of which is that the citizenship of a misaligned
 25 defendant can be disregarded. *E.g., Polyplastics, Inc. v.*

26
 27 ^{3/} Dependable's contention (Motion at 17) that it is an
 28 "indispensable" party to Plaintiff's action is incorrect, but even if
 it were correct, it would not matter. *Dolch, supra*, 702 F.2d at 181
 (indispensability does not preclude realignment).

1 *Transconex, Inc.*, 713 F.2d 875, 877 (1st Cir. 1983) (consent of
2 misaligned defendant not required); *First National Bank of*
3 *Chicago v. Mottola*, 302 F. Supp. 785, 789 (N.D. Ill. 1969),
4 *aff'd sub nom. First National Bank of Chicago v. Ettlinger*, 465
5 F.2d 343 (7th Cir. 1972) ("[The unanimous joinder requirement]
6 cannot be reasonably be understood to give a party who in
7 reality occupies a position in conflict with the other
8 defendants a veto over the removal of the action."). See *New*
9 *York State Insurance Fund, supra*, 2004 U.S. Dist. LEXIS 3124, at
10 *7-8, citing 14 C. Wright & A. Miller, *Federal Practice &*
11 *Procedure* § 3731 at 270 (2d ed. 1984). Thus, because Dependable
12 is more properly aligned with Plaintiffs, rather than defendant
13 INSCORP, the "rule of unanimity" has no applicability here.
14 *Serstad v. Midland-Ross Corp.*, 471 F. Supp. 298, 300 (E.D. Wis.
15 1979) (defendant realigned as a party plaintiff "need not have
16 joined in the petition for removal.").

17 Similarly without application is the requirement of 28
18 U.S.C. § 1441(b) that none of the "parties in interest properly
19 joined and served as defendants is a citizen of the State in
20 which such action is brought," i.e., the "no local defendants
21 rule." Dependable cites this rule as well, and, ordinarily, the
22 presence of Dependable as a defendant would in fact preclude
23 removal, even if Dependable consented.

24 The inapplicability of that provision in the instant
25 matter, however, is demonstrated by the very language of the
26 statute, which requires that such a party be "properly joined"
27 as a defendant. Again, for the reasons addressed above, and in
28 INSCORP's Notice of Removal, Dependable is not "properly joined"

1 as a defendant because it is a "sham" defendant and, even if it
2 were not, its interests are aligned with the Plaintiffs, rather
3 than with defendant INSCORP.

4
5 IV. DEPENDABLE'S INTENTION TO ASSERT A COUNTERCLAIM
6 THAT INCLUDES NON-DIVERSE COUNTER-DEFENDANTS HAS
7 NO RELEVANCE TO WHETHER DIVERSITY OF CITIZENSHIP
8 EXISTS WITH RESPECT TO THE COMPLAINT, OR WHETHER
9 THAT MATTER SHOULD BE REMANDED.

10 Having failed to counter INSCORP's showing that
11 Dependable is either a "sham" defendant, or is misaligned (or
12 both), Dependable argues that it intends to assert a counter-
13 claim against Fairmont, TIG and INSCORP that will also include
14 counter-defendants who are citizens of the State of California.
15 Dependable asserts that, once such a counterclaim is filed,
16 complete diversity will be lacking and this matter will have to
17 be remanded to state court (Motion at 19). This argument is
18 without foundation.

19 In support of this proposition, Dependable cites *Cobb*
20 *v. Delta Exports, Inc.*, 186 F.3d 675 (5th Cir. 1999) and *Morris*
21 *v. Princess Cruises, Inc.*, 236 F.3d 1061 (9th Cir. 2001) (Motion
22 at 20). However, neither case has anything whatsoever to do
23 with the present situation. In both, there was an amendment by
24 the Plaintiff to the removed complaint adding non-diverse
25 defendants. Pursuant to 28 U.S.C. § 1447(e), the district court
26 was required to either deny joinder, or permit the joinder and
27 remand the action to the state court. *E.g.*, *Morris, supra*, 236
28 F.3d at 1068.

1 In the present case, however, Plaintiffs Fairmont and
2 TIG have not sought to add any additional, non-diverse
3 defendants to the removed complaint. Rather, Dependable states
4 that it intends to assert a counterclaim in which some of the
5 counter-defendants are non-diverse. That situation does not
6 call for remand, but instead invokes the Court's supplemental
7 jurisdiction, which can be exercised even as to non-diverse
8 parties. In particular, 28 U.S.C. § 1367(a) permits the
9 exercise of such supplemental jurisdiction "over all other
10 claims that are so related to claims in the action within such
11 original jurisdiction that they form part of the same case or
12 controversy. . . ." It does not matter whether or not the
13 counterclaim is compulsory, but only that it form "part of the
14 same constitutional case or controversy." *HB General Corp. v.*
15 *Manchester Partners, LP*, 95 F.3d 1185, 1198 (3d Cir. 1996).

16 For example, in *State National Insurance Co. v. Yates*,
17 391 F.3d 577 (5th Cir. 2004), the plaintiff insurance company
18 sought a declaratory judgment against its insured on the subject
19 of coverage. The insured filed a counterclaim against the
20 carrier and also added as a counter-defendant the insurance
21 agent, who was non-diverse. Nevertheless, the court of appeals
22 found that complete diversity was not destroyed by the
23 counterclaim and, further, that the district court could
24 exercise supplemental jurisdiction over the counterclaim. 391
25 F.3d at 580-81. Accord *HB General Corp.*, 95 F.3d at 1197-98
26 ("[I]n a diversity action, the district court may exercise
27 supplemental jurisdiction over a defendant's counterclaim
28 ///

1 against non-diverse parties joined as third-party defendants to
2 the counterclaims.") (emphasis in original) (citation omitted).

3 That is precisely the situation here. If Dependable
4 goes ahead with its intention to assert a counterclaim against,
5 *inter alia*, non-diverse parties, that will not destroy complete
6 diversity with respect to the Complaint (in light of the
7 appropriate realignment of Dependable). Rather, it will provide
8 a basis for the Court to assert supplemental jurisdiction over
9 the counterclaim, and resolve the entire controversy within a
10 single case.

11
12 V. DEPENDABLE HAS ASSERTED UTTERLY NO PROPER BASIS
13 FOR THE APPLICATION OF THE DOCTRINE OF ABSTENTION.

14 As virtually an afterthought and as a final
15 distraction, Dependable asserts that the Court should also
16 remand based upon "principles of abstention," because the case
17 arises "from events that occurred in California involving
18 parties who are either residents of California or entities that
19 have availed themselves of the rights and responsibilities
20 associated with doing business in California." (Motion at 20.)

21 The only authority cited for this plea for the Court
22 to abstain is *Quackenbush v. Allstate Insurance Co.*, 517 U.S.
23 706 (1996). However, there is nothing in *Quackenbush* that would
24 support the application of abstention in this case. To the
25 contrary, the *Quackenbush* Court observed "we have often
26 acknowledged that federal courts have a strict duty to exercise
27 the jurisdiction that is conferred upon them by Congress." 517
28 U.S. at 716 (emphasis added) (citation omitted). Indeed,

1 *Quackenbush* upheld the Ninth Circuit's order reversing the
2 district court's remand, based on *Burford* abstention, of a
3 removed action to state court because the action sought damages
4 as well as equitable relief. There is nothing in *Quackenbush* to
5 suggest that a district court should abstain from hearing cases
6 seeking only equitable or declaratory relief, only that a court
7 can abstain in such cases if other "exceptional circumstances"
8 make it appropriate. *Id.*

9 By way of example, the Court in *Quackenbush* noted
10 various situations in which abstention has been held to be
11 appropriate, including "cases that would interfere with a
12 pending state criminal proceeding," or "with certain types of
13 state civil proceedings;" cases "in which the resolution of a
14 federal constitutional question might be obviated if the state
15 courts were given the opportunity to interpret ambiguous state
16 law;" cases raising issues involving the state's sovereign
17 prerogative; and several other extraordinary situations (*id.* at
18 716-17), none of which is present here.

19 There is nothing in *Quackenbush*, or in any other case
20 we have found, in which any court has held it to be appropriate
21 to abstain from hearing coverage disputes between insurance
22 carriers so long as the other jurisdictional requisites are
23 present, as they are here, even where California entities are
24 involved. Indeed, this Court is doubtless well-aware that such
25 disputes are often adjudicated in the federal courts, frequently
26 after removal from state court

27 ///

28 ///

Conclusion

Dependable's motion for remand provides no basis whatsoever for this Court to remand this matter to state court. Dependable does not dispute that the Complaint seeks no relief against it or, as to the question whether the INSCORP policy provides coverage to Dependable (the sole issue raised by the Complaint), that Dependable's interests are aligned with those of the Plaintiffs, not with those of INCORP. Given that fact, Dependable's citizenship should be ignored in determining the existence of complete diversity for jurisdictional purposes. Such diversity would be unaffected by Dependable's proposed counterclaim, which can be heard by the Court under its supplemental jurisdiction.

For all of the foregoing reasons, INSCORP respectfully urges that Dependable's motion to remand this action to state court be denied.

COTKIN & COLLINS
A PROFESSIONAL CORPORATION

By Robert G. Wilson
Robert G. Wilson

Dated: August 16, 2007

Dated: August 16, 2007

1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

3 I, PAT MEDINA, am employed in the aforesaid County, State
4 of California; I am over the age of 18 years and not a party to
5 the within action; my business address is 300 South Grand
6 Avenue, 24th Floor, Los Angeles, California 90071-3134.

7 On August 16, 2007, I served the foregoing INSCORP'S
8 **MEMORANDUM OF POINTS & AUTHORITIES IN OPPOSITION TO MOTION FOR**
9 **REMAND** on interested parties in this action by placing a true
10 copy thereof, enclosed in a sealed envelope, addressed as
11 follows:

12 (SEE ATTACHED SERVICE LIST)

13	<input checked="" type="checkbox"/> BY FIRST CLASS MAIL: I placed such envelope for deposit in the U.S. Mail for service by the United States Postal Service, with first-class postage thereon fully prepaid. I am readily familiar with my employer's practice for the collection and processing of mail. Under that practice, envelopes would be deposited with the U.S. Postal Service that same day, with first class postage thereon fully prepaid, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing shown in this proof of service.
14	<input type="checkbox"/> BY FACSIMILE: I caused the document to be transmitted by facsimile machine compliant with Rule 2003 of Calif. Rules of Court to the offices of the addressees at the telephone numbers shown on the service list.
15	<input type="checkbox"/> BY HAND DELIVERY: I caused such envelope to be delivered by hand to the offices of the addressees.
16	<input type="checkbox"/> BY FEDERAL EXPRESS: I am readily familiar with my employer's practice for collection and processing of FedEx packages. Under that practice, packages would be deposited with FedEx that same day, with overnight delivery charges thereon fully prepaid, in the ordinary course of business.
17	<input checked="" type="checkbox"/> (Federal Courts Only) I declare that I am employed in the office of a member of the court at whose direction this service was made.

18 I declare under penalty of perjury under the laws of the
19 State of California that the foregoing is true and correct and
20 that this document was executed on August 16, 2007, at Los
21 Angeles, California.

22 
23 _____
24 Declarant

(SERVICE LIST)

George D. Yaron, Esq.
Henry M. Su, Esq.
Yaron & Associates
601 California Street, 21st Floor
San Francisco, CA 94108
(Attorneys for Plaintiffs)

Joseph L. Oliva, Esq.
Oliva & Associates ALC
11770 Bernardo Plaza Court, Suite 350
San Diego, CA 92128
**(Attorneys for Defendant
Dependable Sheet Metal)**